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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted] 99

RICHMOND SCREW ANCHOR CO., INC.,
Plaintiff-Petitioner,

vs.

UNITED STATES, Defendant-Respondent.

BRIEF FOR PETITIONER.

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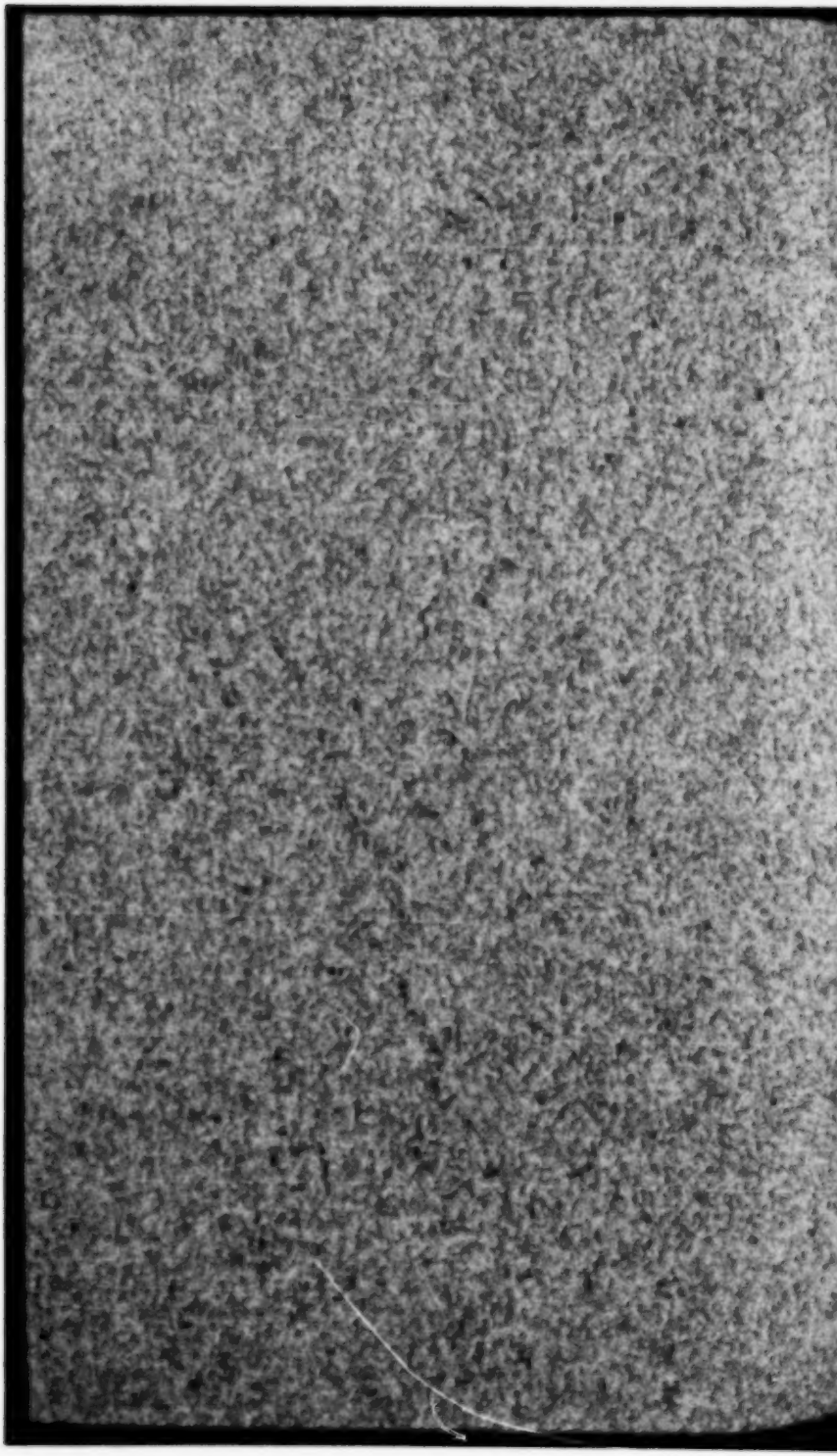

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 540.

RICHMOND SCREW ANCHOR CO., INC.,
PLAINTIFF-PETITIONER,

vs.

UNITED STATES, DEFENDANT-RESPONDENT.

BRIEF FOR PETITIONER.

Statement of the Case.

The suit is brought under the Act of July 1, 1918, Chapter 114, and the true intent and meaning of that act are involved, and also the meaning and application of U. S. R. S. 3477. (In the appendix at the end of this brief will be found these statutes and also the Act of June 25, 1910, which was amended by the Act of July 1, 1918.)

The judgment of the lower court is found at page 25 and on the same page the final order of May 3d, 1926.

In *Sperry Gyroscope Co. v. Arma Engineering Co.*,

decided May 24, 1926, Adv. Ops., June 15, 1926, p. 596, this Court said of the Act of 1918:

> "The true intent and meaning of the statute is not free from doubt."

Our contentions are:

I. Under the Act of 1918 *the use by the United States* of the patented article during the plaintiff's ownership of the patent (*i. e.*, after March 7, 1921) *was an infringement* of the patent and this use in itself and without more supported the plaintiff's petition in the Court of Claims and entitled the plaintiff to a recovery under the findings of fact made by the Court of Claims. (Rec., par. (*a*), p. 3.)

II. Under the Act of 1918 *the manufacture* of the patented article *by the contractor for the United States* on January 1, 1919, prior to plaintiff's ownership of the patent was an infringement of the patent by the contractor, the right to recover the entire compensation for which from the United States was given to the then owner of the patent by the Act of 1918 and was assignable along with the ownership of the patent, in spite of U. S. R. S. 3477, and this manufacture in itself and without more supported the plaintiff's petition in the Court of Claims and entitled the plaintiff to a recovery under the findings of fact made by the Court of Claims. (Rec., par. (*d*), sub. par. (4), p. 4.)

III. U. S. R. S. 3477 is not applicable under the circumstances of the case at bar. (Rec., p. 4, par. (*d*).)

IV. The "entire" compensation referred to in the Act of 1918 includes interest on the principal sum awarded. (Rec., p. 5, par. (*e*).)

ARGUMENT.

Point I. "Use by" the United States after March 7, 1921, when plaintiff's ownership of the patent began, was an infringement of the patent and without more supported the plaintiff's petition in the Court of Claims and entitled the plaintiff to a recovery under the findings of fact made by the Court of Claims.

The monopoly of a patent includes the sole right to use throughout the term of the patent as well as to make and sell.

Use by the United States after plaintiff's ownership began invaded the monopoly of the patent and trespassed upon plaintiff's rights thereunder and for this trespass suit lies in the Court of Claims under the Act of July 1, 1918, unless something in that act licensed that use under circumstances such as those of the present case.

The Court of Claims dismissed the petition on the theory that the prior installation as of January 1, 1919, consummated an act of appropriation by the United States under the sovereign right of eminent domain of a license to use under the patent the entire 810 cargo beams then installed, and hence that the use after March 7, 1921, was licensed under the patent.

The somewhat similar Act of 1910 has been held by this Court not to vest in the United States a license under a patent infringed by it. This holding was

made in *Cramp v. International Co.*, 246 U. S., 27, and applied in *Marconi Wireless Tel. Co. v. Simon*, 246 U. S., 45.

Prior to those decisions the district courts and circuit courts of appeals (*e. g., Marconi Wireless Tel. Co. v. Simon*, 227 Fed., 906, and 231 Fed., 1021, and in other cases) had considered the Act of 1910 in connection with the decision of this Court in *Crozier v. Fried. Krupp Actiengellschaft*, 224 U. S., 290, and the district court had held in the Marconi case that from such considerations "it resulted that there existed in favor of the United States a general license to use patent rights when necessary for its governmental purposes," and thereafter the Circuit Court of Appeals for the Second Circuit affirmed this decision "upon the theory of the license resulting from the Act of 1910 in accordance with the views which had been expressed by the trial court." We quote from the opinion of this Court in the Marconi case, 246 U. S., 46.

> "In view of the construction which we have given the Act of 1910 in the case of William Cramp & Sons Ship & Engine Bldg. Co. vs. International Curtis Marine Turbine Co., just decided, 246 U. S., 28, *ante* 560, 38 Sup. Ct. Rep., 271, it is apparent that both the courts below erred, since the significance which they gave to the statute, and upon which their conclusions were based, we have held in the case stated to be without foundation. • • • Under these circumstances, as we have clearly removed by our decision in the Cramp case all reasons for misconception concerning the statute, and have thus cleared the way for the discharge by the

court below of its duty, we think the case before us, etc. * * *

"Our order, therefore, will be one reversing the decrees of both courts below and remanding to the District Court to the end that, in the light of the construction which we have given the Act of 1910, the rights of the parties may be considered and determined."

Is the Act of 1918 any different in this regard from the Act of 1910?

The Act of 1918 differs from the Act of 1910 in the following important particulars:

1. It extends the scope of the act from inventions "used by the United States without license of the owner" of the patent, to inventions "used or manufactured by or for the United States without license of the owner."

2. It changes the optional remedy (the "owner may recover"), to an apparently exclusive remedy (the "owner's remedy shall be").

3. It changes the recovery from "reasonable compensation for such use," to "reasonable and entire compensation for such use and manufacture."

There is nothing, we submit, in these differences, or in any of them, to justify the Court of Claims in construing the Act of 1918 on a theory that was rejected by this Court in construing the Act of 1910.

The Court of Claims, in dismissing plaintiff's petition, reverted to the theory of general license in favor of the United States to use patent rights when necessary for its governmental purposes, which this Court

held to be without foundation as applied to the construction of the precisely analogous Act of 1910. In regard to *use by* the United States the two acts are not distinguishable. The decision of the Court of Claims construing the Act of 1918 is in conflict with the cited, applicable, decisions of this Court construing the Act of 1910.

Sperry Gyroscope Co. v. Arma Engineering Co., Adv. Ops. No. 15, June 15, 1926, p. 596, decided May 24, 1926, arose under the Act of 1918 but it raised only the question of jurisdiction of the District Court to hear and determine a suit for injunction and damages for alleged infringement of a patent against a contractor who manufactured for the United States.

The Court said:

> "The argument is that the Act of 1918 deprived the District Court of jurisdiction over the controversy between the present parties because it limited the patent owner's remedy, under circumstances like those here disclosed, to a suit against the United States in the Court of Claims. But we think this contention goes to the merits of the matter, and not merely to the question of jurisdiction. *The true intent and meaning of the statute is not free from doubt;* but certainly there is nothing therein which shows any clear purpose to take away the power to decide. It became the duty of the court below to consider and determine whether, in the circumstances stated, appellee was relieved of liability and permitted by the statute to do what otherwise would have constituted a violation of appellant's rights. There was jurisdiction."

There is in this decision as to the liability of one who manufactured for the United States to answer in the District Court, no holding or implication, even the remotest, that *as to use by the United States* the Act of 1918 is different from the Act of 1910, but quite the reverse.

If the United States had obtained a license from the original owner by agreement, or if the original owner had sued and obtained a judgment in the Court of Claims for reasonable compensation for the use of the invention throughout the life of the patent and the judgment had been satisfied the plaintiff would have no claim for the use by the United States after March 1, 1921. But nothing of this kind having occurred, each day's use of the invention after March 1, 1921, was a new infringement for which the United States was liable directly to the plaintiff for additional compensation under the Act of 1918, and this the Court of Claims should have included in an award to the plaintiff.

Point II. Manufacture of the patented article by the contractor for the United States on January 1, 1919, prior to plaintiff's ownership of the patent, was an infringement of the patent by the contractor, the right to recover the entire compensation for which, from the United States, was given to the then owner of the patent by the Act of 1918 and was assignable along with the ownership of the patent, in spite of U. S. R. S. 3477, and without more, supported the plaintiff's petition in the Court of Claims and entitled the plaintiff to a re-

covery under the findings of fact made by the Court of Claims.

The plaintiff, having such an interest in the patent, as, without the Act of 1918, would have supported an infringement suit by it against the contractor for manufacturing the infringing cargo beams for the United States, has, on the reasoning and implication of this Court in *E. W. Bliss Co. v. U. S.*, 253 U. S., 187, such an interest as will support its petition in the Court of Claims against the United States for that infringement.

In *E. W. Bliss Co. v. U. S.* (*supra*), the Act of 1910 was in question. This Court, in holding that the title of the plaintiff there was "a mere license, not sufficient to sustain a suit for infringement," said:

> "Giving to this statute, as we do, the liberal interpretation placed upon it in Crozier *vs.* Krupp Aktiengesellschaft, 224 U. S., 290, and in William Cramp & Sons Ship & Engine Bldg. Co. *vs.* International Curtis Marine Turbine Co., 246 U. S., 28, the 'owner' who may maintain an infringement suit against the government must have at least such an interest in the patent as, without the statute, would support such a suit against a defendant other than the United States."

A natural and reasonable corollary of this would be, that if the interest in the patent were sufficient, without the corresponding statute of 1918, to support a suit against a defendant other than the United States, it would under the statute support a suit in the Court of Claims against the United States.

Again by the Act of 1918 the United States would appear to consent to be sued in the Court of Claims for the *entire* compensation, and this clearly includes compensation for the manufacture by the contractor for the United States because such *manufacture for* the United States is explicitly included in the terms of the act.

Prior to the act the claim against the contractor for compensation for such manufacture would have been assignable under familiar law.

On the reasoning of this Court in *Standard Oil Co v. United States*, 267 U. S., 76, it may apparently be assumed that by the Act of 1918 the United States assented to the assignability of such a claim for compensation for the infringing acts of the contractor as an ordinary incident of the ownership of the patent and of its assignability under the law. In *Standard Oil Co. v. United States* (*supra*), the United States had under an Act of September 2, 1914, issued a policy of marine insurance and some question arising as to the allowance of interest the Court said:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that, in case of disagreement, it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such a business."

Again this Court in *Sperry Gyroscope Co. v. Arma Engineering Co., supra*, has held that the district courts have jurisdiction to determine, in a suit against the contractor, whether he "was relieved from liability

and permitted by the statute to do what otherwise would have constituted a violation" of the rights of the owner of the patent.

To construe the Act of 1918 as relieving the contractor from all liability to the then owner of the patent or to his assignee and substituting therefor a liability of the United States to the then owner of the patent only and not to his assignee, would appear to be taking private property for public use without due process of law or just compensation, and certainly would not give the owner of the patent *an additional remedy* as the act purports to do, but a substantially curtailed remedy. It is certainly not clear that the Act of 1918 intended this curtailment of remedy.

Again, plaintiff's claim, insofar as it is based upon manufacture by contractors for the United States, is essentially *a claim against the contractors* with all the legal incidents of such a claim, including assignability, and it would not seem to be changed in this its essential character by the Act of 1918 by which the United States assumed full responsibility for the "entire" compensation for the infringement including this phase or part of it.

It can hardly be argued that in spite of the Act of 1918 there remains in the plaintiff the right to collect from the contractors all their profits made by their infringing manufacture for the United States and all the damage caused to plaintiff thereby; and yet this is the necessary legal consequence of the decision of the Court of Claims, else property has been taken for public use without due process of law and without just compensation.

Point III. U. S. R. S. 3477 is not applicable under the circumstances of the case at bar.

1. The subject matter of the assignments in question is the infringement of Letters Patent and we submit that in view of the Patent Statutes and the Acts of 1910 and 1918 such assignments are not within the prohibition of U. S. R. S. 3477.

This question was in terms passed upon in *William F. Brothers v. United States*, 250 U. S., 88; but the holding there being non-infringement the question did not really arise and may not have been judicially considered. The case at bar raises the question as to a part of the infringement charge.

Patent property is peculiar and its assignability is provided by special statute (U. S. R. S. 4898).

This Court said in *Crown v. Nye*, 261 U. S., 24, 40:

> "This view ignores the peculiar character of patent property and the recognized rules for the transfer of its ownership and its incidents. Patent property is the creature of statute law, and its incidents are equally so, and depend upon the construction to be given to the statutes creating it and them, in view of the policy of Congress in their enactment. This is shown by the opinion of this Court in Waterman v. McKenzie, 138 U. S., 252; 34 L. Ed., 923; 11 Sup. Ct. Rep., 334, already cited, and in the line of authorities followed therein. It is not safe, therefore, in dealing with a transfer of rights under the patent law, to follow implicitly the rules governing a transfer of rights in a chose in action at common law. As Chief Justice Taney said in Gayler v. Wilder, 10 How., 477, 494; 13 L. Ed., 504, 511:

> " 'The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it, cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes.' "

The transfer of the right to sue for an infringement that began in the past and continues in the present and in the future, as an incident of the transfer of the ownership of the patent itself, cannot be regulated by the rules of the common law, and, by parity of reasoning, cannot, we submit, be subject to an ancient prohibition (that of U. S. R. S. 3477) against the assignment at common law of claims for the payment of money by the United States, or, if so, the Act of 1918 repeals U. S. R. S. 3477 in that particular application.

Moreover, the Acts of 1910 and 1918 in explicit terms provide what defenses the United States may avail itself of, as follows:

> "*Provided, further*, That in any such suit the United States may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise."

An ordinary defendant in an action for infringement could not plead U. S. R. S. 3477 nor, by implication, can the United States in a suit under the Acts of 1910 and 1918.

2. Again the assignments here in question carry the ownership of the patent as well as all claims for past infringements of same, and they are thereby distinguished from the ordinary claim against the United States for money to which U. S. R. S. 3477 relates. The past infringements in question merge in the present and continuing infringement and become one with it.

3. Again the assignments here in question explicitly authorize and empower the assignee to sue in his or its own name for past infringements. This on the theory of agency would seem to take the case outside the purview of U. S. R. S. 3477.

Point IV. The "entire compensation" referred to in the Act of 1918 would seem to include interest from an appropriate date on the principal sum awarded.

This is on the authority of decisions of this Court in the "just compensation" cases construing other similar statutes, such decisions as

United States v. Benedict, 261 U. S., 296.
Seaboard Air Line v. U. S., 261 U. S., 299.
United States v. Brown, 263 U. S., 78.
Brooks Scanlon Corp. v. U. S., 265 U. S., 106.

Conclusion.

In view of the foregoing, it is respectfully submitted that this petition should be allowed.

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Dated New York, August 5, 1926.